Filed 3/18/14 P. v. Chill CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JENNIFER ANNE CHILL, Defendant and Appellant.	2d Crim. No. B239320 (Super. Ct. No. F452574) (San Luis Obispo County)

Jennifer Anne Chill appeals from the judgment following her conviction by jury of vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (b)); driving under the influence of alcohol causing injury (Veh. Code, § 23153, subd. (a));[1] and driving with a blood alcohol concentration of .08 percent or greater and causing injury (§ 23153, subd. (b)), with findings that she personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)) and proximately caused death or bodily injury to more than one person (§ 23558). The trial court sentenced appellant to four years in state prison. Appellant contends: (1) there is not sufficient evidence to support her convictions; (2) the court erred by omitting the sudden emergency/imminent peril doctrine from the jury instructions for the section 23153 offenses; and (3) the court abused its discretion by

[1] All further statutory references are to the Vehicle Code unless otherwise stated.

providing a response to a jury question that exceeded the scope of its inquiry.[2] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

On October 3, 2010, appellant left a barbeque in Paso Robles where she drank several cocktails. On her way home, she drove eastbound and uphill on Serenade Drive in her Pontiac Sunfire. Serenade is a steep, curved road, with a 12 percent grade, and no paint or other markings to designate a center line. Serenade is almost 32 feet wide, with hillside embankments along its north and south curbs.

While moving uphill, the Sunbird collided with the GMC truck Jacob Keller was driving downhill. The GMC overturned and ejected Keller and his passenger, Nolan Martinez. The left rear portion of the GMC landed on Keller. He died at the scene. Martinez, who survived, lay beside the GMC.

Immediately after the collision, Tiana Gomez drove uphill on Serenade with Katelyn Grunow as a passenger. The GMC was in a cloud of dust, with the back of its truck bed against the hillside, at the north curb. The Sunfire faced east, near the south curb, on the westbound side of the road. Appellant was sitting inside. Gomez and Grunow repeatedly yelled and asked her if she had called 911 or the police. Appellant just repeatedly stated, "I was almost home."

Police and fire personnel arrived at the scene around 8:15 p.m. Appellant was outside the Sunbird. She told bystanders she "was just walking by" when she saw it happen, that "they" hit her, and it was not her car. Gomez told appellant she was the one who "did this," and she smelled of alcohol. Gomez showed the officers appellant's Sunfire, and told them appellant was drunk. When questioned by officers, appellant

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[2] Appellant also claims that the information never charged her with any "Count 3" offense of driving with a blood alcohol concentration of .08 percent or greater and causing injury (§ 23153, subds. (a), (b)), and she was somehow convicted of that "phantom count." The record belies that claim. Count 3 of the information filed on December 31, 2010, charged appellant with that offense.

initially said she did not know what happened. Then she said she drove by the GMC when it crashed, and did not think it had collided with her car. The officers saw significant damage on the left side of the Sunfire. At some point, appellant said the GMC was on her side of the road. After observing appellant's slurred speech, lack of balance, and odor of alcohol, officers administered field sobriety tests. Appellant failed them. The officers asked her to take a breath test, and she declined. She gave a blood sample at a hospital at 9:25 p.m.

Paso Robles police officer Chubbuck examined the GMC and Sunfire at the collision scene. He testified the Sunfire had a flat left front tire which was shoved toward the back of its wheel well, and the wheel had significant scrapes on its outer rim. The left rear tire and wheel of the GMC were forced backward, against the wheel well.

Atascadero Police Officer Caleb Davis arrived at the scene at about 2:00 a.m., after the vehicles were towed away. He examined paint marks made earlier by investigating officers which designated the resting point of each vehicle, as well as visible skid marks, friction marks, and other evidence. Neither vehicle left pre-impact skid marks on the road. There was a tire compression skid mark from the Sunfire's flat left front tire. That mark had two parallel black lines that are sometimes left by the outer walls of a tire when it goes flat. Davis used a total station device to measure distances, and determined the compression mark was two feet, five inches beyond the center of Serenade, on the GMC's side of the road.[3] There were no skid marks from the Sunfire's other tires, which suggested its other wheels were rotating prior to impact.

Davis also inspected both vehicles. He concluded the Sunfire's left front tire struck the left rear tire of the GMC and their wheel rims locked at the compression mark, the point of maximum engagement (where the vehicles were closest together). Davis examined the vehicles later, sometimes with the assistance of three members of a

[3] A total station device measures in three dimensions, like a surveyor's tool. The defense expert and a prosecution investigator used a different measuring device and determined the compression skid mark was about one foot, eight inches, or one foot, four inches beyond the center of Serenade, on the GMC's side of the road.

California Highway Patrol Multi-Disciplinary Action Investigation team. In March 2011, they examined the vehicles at the accident scene. Tow truck operators helped place vehicles at the point of maximum engagement, using the compression skid mark as a reference point.

Davis testified that the physical evidence, including the compression mark, led him to conclude the force of the Sunfire caused the GMC to rotate counter-clockwise, slide sideways, flip, roll over downhill and land upright, against the north hillside. The Sunfire continued moving uphill, across the westbound lane, until it stopped near the curb on the south side of the road. Davis opined that appellant caused the collision by driving the Sunfire across the midpoint of the road, into the GMC's side of the road.

During cross-examination, defense counsel asked about the pre-impact position of the GMC. Davis responded that "[t]he physical evidence doesn't suggest anything." Counsel asked if one were to trace the GMC back, extrapolating from its angle at the maximum engagement point, whether the GMC would not have been in the eastbound lane. Davis responded that it might have been, if the GMC did not turn its wheels, which was not discernable from the physical evidence.

Sandra Rakestraw, a forensic alcohol toxicologist analyzed appellant's blood sample and concluded her blood alcohol concentration was .19 percent at 9:25 p.m. on October 3, 2010. It would have been higher at 8:25 p.m., and could have been as high as .21 percent.

Keller died at the accident scene as a result of multiple blunt force traumatic head injuries. His system did not contain any drugs or alcohol. Martinez survived and received intensive care treatment for six days. He incurred multiple severe injuries and could not attend school for months. He suffers from permanent memory impairment and other problems.

Defense Evidence

Christopher Gayner testified as an expert for the defense. He held undergraduate and graduate degrees in mechanical engineering, and had completed specialized courses in accident analysis and reconstruction.

Gayner analyzed the evidence prepared by Davis and other officers. His testimony emphasized the GMC's center of gravity and the vehicles' first impact, because the center of gravity becomes the vehicle's "pivot point" in a collision. The first impact occurred precisely at the GMC's center of gravity. At the point of maximum engagement, the GMC was "at a significant angle to the center line," with its nose angled away from the center. Gayner therefore opined the GMC steered or turned right just before the impact point. Extrapolating backward, he concluded the GMC was on the Sunfire's side of the road two or three seconds before it veered into the Sunfire's front left tire. The GMC rotated counterclockwise and flipped over because it was turning right prior to impact. Gaynor thus opined the collision resulted because seconds before the impact, the GMC was at least "half of a truck width" into the Sunfire's side of the road. During cross-examination, Gaynor conceded the Sunfire's left front tire compression mark was on the GMC's side of the road. He also acknowledged that the Sunfire did not reorient between the points of first impact and maximum engagement.

DISCUSSION

Substantial Evidence

Appellant contends that there is not sufficient evidence to support her convictions of vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (b)); driving under the influence of alcohol causing injury (§ 23153, subd. (a)); or driving with a blood alcohol concentration of .08 percent or greater and causing injury (§ 23153, subd. (b)). More specifically, she contends there is no evidence of the requisite element of each offense that she was driving on the wrong side of the road, in violation of section 21650. We disagree.

In assessing the sufficiency of evidence, we consider the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence, that is, "evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Burney* (2009) 47 Cal.4th 203, 253.) We presume all facts in support of the judgment which could be deduced from the evidence, and do not reweigh the evidence or redetermine credibility. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) Reversal is warranted only if there is no substantial evidence to support the conviction under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Each of appellant's convictions required that the prosecution prove she drove on the left half of the roadway in violation of section 21650. She was driving the Sunfire. As the defense expert conceded, the Sunfire left a tire compression mark on the left half of Serenade (the westbound lane). The prosecution expert opined that the Sunfire was on the left (westbound) side of the road before the collision. That evidence supports the inference that appellant was driving on the left side of the road before the collision.

Imminent Peril/Sudden Emergency Doctrine Instruction

Appellant contends the trial court erred by failing to include the sudden emergency/imminent peril doctrine (sudden emergency doctrine) in instructing the jury regarding driving under the influence and causing injury and driving with a blood alcohol concentration of .08 percent or greater and causing injury (the section 23153 offenses). The court, however, did give the jury a version of the pattern instruction for vehicular manslaughter (CALCRIM No. 591) which included the sudden emergency doctrine.[4]

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[4] Relevant portions of the version of CALCRIM No. 591 used by the court follow: "The defendant is charged in Count one with vehicular manslaughter with ordinary negligence while intoxicated in violation of Penal Code section 191.5(b). [¶] To prove that the defendant is guilty of vehicular manslaughter with ordinary negligence while intoxicated, the People must prove that: [¶] 1. The defendant drove under the influence of an alcoholic beverage/or drove while having a blood alcohol level of 0.08 or higher; [¶] 2. While driving that vehicle under the influence of an alcoholic beverage/or at a blood alcohol level of 0.08 or higher, the defendant also committed an infraction; [¶] 3.

The court instructed the jury with CALCRIM Nos. 2100 and 2101, the pattern instructions for the 23153 offenses. The bench notes for CALCRIM Nos. 2100 and 2101 state that "[o]n request, if supported by the evidence, the court must instruct on the 'imminent peril/sudden emergency' doctrine."

As the parties acknowledge, the record does not indicate that appellant requested any sudden emergency doctrine instruction as to any offense, or explain why the court included that doctrine in the vehicular manslaughter instructions. Because the evidence did not support any sudden emergency doctrine instruction, we conclude the court inadvertently included that doctrine in the vehicular manslaughter instructions. Appellant argues the instruction was supported because the prosecution did not present evidence which established the location of the GMC prior to its impact with the Sunbird, and appellant told the police the GMC was in her lane before the collision. In so arguing, she ignores or discounts several inconsistent and virtually contemporaneous statements regarding the accident. Among other things, appellant denied the Sunbird was her car, said she was just walking by at the time of the collision, and said she did not know what

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The defendant committed the infraction with ordinary negligence; [¶] AND [¶] 4. The defendant's negligent conduct caused the death of another person. [¶] The People allege that the defendant committed the following infraction: VC 21650. . . . [¶] Ordinary negligence is the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation/or fails to do something that a reasonably careful person would do in the same situation. [¶] *A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.* [¶] An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] The People allege that the defendant committed the following infraction, VC 21650. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed the named infraction. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant committed vehicular manslaughter with ordinary negligence while intoxicated. If the People have not met this burden, you must find the defendant not guilty of that crime." (Italics added.)

happened. The trial court did not err by failing to include the sudden emergency doctrine in the instructions regarding the 23153 offenses.

Jury Question

Appellant further contends that the trial court erred in responding as it did to a jury question by going beyond the scope of its inquiry. We disagree.

The jury submitted two inquiries during deliberations. On November 18, 2011, it asked the following question: "Is it a logical and reasonable inference that the occupants of the GMC were ejected and the truck's airbags did not deploy because the truck's occupants were not wearing seat belts[?]" On the morning of November 21, after conferring with counsel, the trial court responded in writing: "This concern was never raised by the parties nor was any evidence presented on this point."[5]

That afternoon, the jury sent the court the following inquiry: "We have reached a verdict on counts 2 and 3 and all 4 special circumstances. We are unable to reach a unanimous verdict (9-3) on count 1 [vehicular manslaughter]. What should we do?" The prosecutor asked the court to respond by giving the jury the language from CALCRIM No. 591 which states "there may be more than one cause of death" and explains "what a substantial factor means." Defense counsel asserted his belief the jury was contemplating the sudden emergency doctrine "because it [was] the only safe harbor under 591 that [was] consistent with, if the jury [was] believing it, the statements of [appellant] to the officers and the opinion of the [defense expert]." He objected that the proposed substantial factor language would "further confuse that [sudden emergency] issue or water it down." The court overruled defense counsel's objection and advised the jury as follows, in writing: "You're further instructed as follows: There may be more than one cause of death. An act causes death only if it is a substantial factor in causing

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[5] The court correctly excluded evidence regarding the victims' failure to use seat belts. (*People v. Wattier* (1996) 51 Cal.App.4th 948, 954-955 [proper to exclude evidence of victim's failure to wear seatbelt because it was irrelevant to defendant's criminal responsibility].)

the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes death. [¶] Whether or not Mr. Keller or Mr. Martinez were wearing seat belts is not a fact which should affect your verdict."

When a jury asks a question after retiring for deliberation, Penal Code "[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law." (*People v. Smithey* (1999) 20 Cal.4th 936, 985, fn. omitted.) But "[t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) The court has a duty to help the jury understand the legal principles it is asked to apply and "clear up any instructional confusion expressed by the jury." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.)

However, jury questions can present a court with difficult choices. The risk of giving answers that are misleading, inaccurate, or unresponsive must be weighed against the danger that excessive caution will leave a jury floundering. (See *People v. Beardslee, supra*, 53 Cal.3d at p. 97; *People v. Gonzales* (1999) 74 Cal.App.4th 382, 391, disapproved with respect to another point in *People v. Anderson* (2011) 51 Cal.4th 989, 998, fn. 3.) A trial court "must do more than figuratively throw up its hands and tell the jury it cannot help" but retains discretion under section 1138 to "decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*Ibid.*) We apply the abuse of discretion standard to our review of Penal Code section 1138 issues. (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746.)

Appellant argues the court abused its discretion because its response went beyond "the jury's second question and told them to disregard the fact that the occupants of the truck were not wearing seatbelts." She argues the challenged response was

prejudicial because the jury would not have convicted her of vehicular manslaughter but for that response. She also asserts that the court should have provided counsel an opportunity to argue after it instructed the jury concerning the substantial factor concept.

In this case, the jury's second inquiry indicated it had reached an impasse. In that context, the court has multiple options, as described in rule 2.1036 of the California Rules of Court, as follows: "After a jury reports that it has reached an impasse in its deliberations . . . [¶] If the trial judge determines that further action might assist the jury in reaching a verdict, the judge may: [¶] (1) Give additional instructions; [¶] (2) Clarify previous instructions; [¶] (3) Permit attorneys to make additional closing arguments; or [¶] (4) Employ any combination of these measures."

The trial court acted within its discretion in responding to the jury's second inquiry with the challenged second response, without permitting counsel to argue further. The second inquiry quickly followed the court's response to the first inquiry regarding the victims' seatbelts. The court understandably inferred its first response did not eliminate the jury's confusion. The statements in the challenged response correctly stated the law. (*People v. Wattier*, *supra*, 51 Cal.App.4th at pp. 954-955 [victim's failure to wear seatbelt was a preexisting concurrent cause of injury which did not relieve defendant of criminal responsibility].) The court had already instructed the jury with a version of CALCRIM No. 591 that explained causation. The substantial factor language in the response was an optional paragraph of CALCRIM No. 5.91 which the court did not include when it originally instructed the jury. That language further explained the causation concept. After considering both inquiries, the court reasonably concluded further instruction was

required to help "clear up any instructional confusion expressed by the jury." (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1212.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Barry T. LaBarbera, Judge

Superior Court County of San Luis Obispo

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